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U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

DATE: APR 26, 1989
CASE NO. 88-ERA-4

IN THE MATTER OF

DANIEL MILLER,
Complainant
v.
EBASCO SERVICES, INC.,
Respondent

J. Walter Park, IV, Esq. and
Kenneth R. Cooper, Esq.
For the Complainant

Samuel E. Hooper, Esq.
For the Respondent

BEFORE: QUENTIN P. McCOLGIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING THE COMPLAINT

This is an action involving a complaint of discrimination under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. Complainant, Daniel Miller, seeks $50,000.00 in damages *1/* from respondent, Ebasco Services, Incorporated (Ebasco).

This case was referred to the Office of Administrative Law Judges on October 24, 1987. The matter was scheduled for hearing on December 7, 1987. On November 27, 1987 complainant waived the time constraints imposed by the regulations found at 29 C.F.R. § 24.6(a)(b) and filed a motion for continuance. The undersigned granted this motion and rescheduled the hearing for January 12,
1988. A telephone conference was held in this matter on December 15, 1987, at which time the parties jointly requested another continuance. The undersigned granted this continuance. The matter was called for formal hearing on February 2, 1988. At that

[ALJ PAGE 2]
time the parties were afforded an opportunity to present evidence and argument in support of their respective positions. Proposed

*1/* The parties entered into a stipulation of damages wherein it is stipulated that contingent upon a determination of entitlement to damages, complainant's damages were $50,000.00.

findings of fact and conclusions of law were submitted by both parties subsequent to the formal hearinq. To the extent that these proposed findings are not adopted they are rejected as either inaccurate or unnecessary for the disposition of the case. Having considered all of the evidence and argument, the undersigned does hereby issue the findings, conclusions and order set forth below.

*FINDINGS OF FACT 2/*

Miller, complainant, was hired by respondent, Ebasco Services, Incorporated as a quality control coatings inspector in January, 1984. (Tr. p. 22). Miller received a certification as a coatinqs inspector upon passing a test administered to him. (Tr. p. 25). Miller served as a quality control coatings inspector for Ebasco from then until the fall of 1985. For the first three or four months he was assigned to the area of the worksite designated as Unit I. (Tr. p. 31). Thereafter he was assigned to the fabrication shop where he continued to work as a coatings inspector for about 5 months. (Tr. pp. 34, 71, 77). Sometime around Auqust, 1985, Miller contacted the Nuclear Requlatory Commission (NRC) concerning quality control procedures involving the application of safety coatings. (Tr. pp. 66-79). In the fall of 1985, Miller was transferred to the mechanical quality control group and, after a period of several months during which he studied the specifications applicable to mechanical inspections, was certified as a mechanical quality control inspector in January or February, 1986. (Tr. p. 77). In February, 1987, Miller, as well as other certified coatings inspectors, were again assiqned to the quality control coatings group to expedite the coatings work needed to complete Unit I. (Tr. p. 392).

Miller reported to work on the Unit 1 second shift of the quality control coatings group on February 23, 1987 and was assigned to work under the direction of the second shift lead quality control coatings inspector, Al Gunter. (Tr. p. 91, 358). The supervisor of the second shift coatings inspectors was Dave Emory and the second shift quality control site supervisor

[ALJ PAGE 3]
was Don Richter. (Tr. p. 334). Miller was not immediately assiqned to perform quality control inspections, but was assigned to amiliarize himself with the site coatings specifications as

they had chanqed significantly from when he had previously served as a quality control coatings inspector. (Tr. pp. 91, 204, 358). Miller spent the first week he was assiqned to the quality control coatings group reading the specifications. (Tr. pp. 96, 358-359). A fellow quality control coatings inspector, Duane Soileau, offered Miller the opportunity to accompany him on his

*2/* Citations to the transcript of the hearing will be shown as Tr. . Citations to Complainant's Exhibits will be CX and to Respondent's Exhibit RX .

inspection of coatings work being performed on the polar crane in Unit l, but Miller declined the invitation stating that "was a job for younq men." (Tr. p. 443, contra. Tr. pp. 204-205). A similar invitation was extended to Miller by A1 Gunter which invitation was also declined by Miller. (Tr. p. 359, contra. Tr. pp. 204-205).

Miller was absent from work on Monday, March 2, 1987, and began performing quality control coatings inspections on March 3, 1987. (Tr. pp. 96-97). On that date Miller also prepared a memorandum to Gunter suggesting ways to reduce the amount of paperwork in the coatings group. (RX 2). Miller's memorandum was in response to a request for such suggestions made by the first shift quality control coatings supervisor, Johnny Stevens. (Tr. p. 213). One of Miller's suggestions was to cease taking an ambient temperature reading every four hours because the ambient temperatures inside the Unit 1 reactor containment building were controlled by the Control Room and kept at a constant figure which could be obtained by "callinq ex. 8595." (RX 2; Tr. pp. 213-214). Miller discussed his suggestions with Gunter on March 4, 1987. (Tr. p. 98). Miller emphatically expressed his opinion that it was not necessary to take an ambient temperature reading every four hours as required by the coatings specifications. Gunter instructed Miller that unless and until the specifications were changed they were obligated to comply with the specifications as written. (Tr. p. 100, 335-336). Gunter prepared a memorandum to Emory documenting his conversation with Miller and that Miller had been instructed to comply with the existing specifications and procedures. (Tr. pp. 335-336, 578; CX 14).

On the evening of March 5, 1987, Miller was assigned to perform a pre-application inspection of coating work to be performed on the polar crane. (Tr. pp. lO6-107). A pre-

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application inspection consists of a visual inspection of the areas to be coated to insure that they are clear and free of dirt or grime, the taking of a dry film thickness reading and an ambient temperature reading. (Tr. pp. 107-108, 394, 423). Quality Control Inspector Soileau was assigned to perform a pre-application inspection of coating work to be performed on the orbital bridge, slightly above the polar crane. (Tr. p. 394). Soileau observed Miller on the polar crane on that night, but

never saw Miller perform the pre-application inspection of the work to be performed on the polar crane. On the following evening, Friday, March 6, 1987, Soileau was again assigned to perform a pre-application inspection on the orbital bridge. (Tr. pp. 111, 400). Due to his concerns that Miller had not performed an adequate inspection the previous niqht, Soileau observed Miller more closely on the night of March 6, 1987 and was again concerned that Miller had not properly performed the required pre-application inspection. (Tr. p. 423).

The inspection report Miller prepared for the pre-application inspection of March 6, 1987, reflects that he took an ambient temperature reading at 2050 (8:50 p.m.) and Miller testified that he came down from the Polar crane and returned to the coatings office shortly thereafter. (CX 5; Tr. p. 210). Soileau completed his pre-application inspection of the orbital bridge and returned to the coatings trailer at approximately 9:45 p.m. and Miller was in the trailer. (Tr. p. 426). Miller and Soileau remained in the coatings trailer attending to paperwork for the remainder of the evening. Miller left the trailer on two or three occasions, but was gone for only four or five minutes on each occasion. (Tr. pp. 428, 442). Miller signed out of the coatings office and out of the main gate to the site at 2400 (midnight) on March 6, 1987. (RX 15, 17)~. M1ller testified that he received a telephone call from the foreman who was supervising the coatings work informing him of the time of completion of the work. (Tr. p. 211). Miller's inspection report reflects that the coatings work was completed at 2400 (CX 5, block 30; Tr. pp. 210-211).

Prior to Miller leaving the site on the niqht of March 6, 1987, Soileau asked Miller for his inspection report for that night because the craftsmen performing the work on the orbital bridge were using the same paint mix as were the craftsmen on the polar crane and Soileau needed to include the paint mix information on his report. (Tr. pp. 430-431). After Miller left the site, Soileau noticed that Miller had entered on his report that he had taken a second ambient temperature reading at the polar crane at 2355 (11:55 p.m.). (Tr. pp. 431-432; CX 5).

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[ALJ PAGE 5]
Soileau knew that Miller could not have taken ambient temperature readings at the polar crane at 2355 because Miller had been in the coatings trailer at that time and had left to go home five minutes later at 2400 (midnight). (Tr. p. 432). Futhermore Soileau believed that Miller did not take the second ambient temperature reading as required by the specifications because Miller had been in the coatings trailer with Soileau since from 9:45 p.m. that evening until midnight and while Miller had left the trailer on two or three occasions during that time interval for five or less minutes each time, he had not been absent from the trailer long enough to have performed the second ambient temperature readings.*3/* (Tr. p. 403-405). Soileau informed Gunter of his concerns prior to leaving the site and Gunter prepared a memorandum to Emory advising him of Soileau's concerns. (Tr. p. 341, 359-360, 434, 571; CX 17). Soileau

reported his concerns to Gunter because he considered it a part of his responsibility to report any concerns he had regarding the safety of the plant. (Tr. pp. 447-449).

*3/* It would take at least 10 to 20 minutes to go to and from the coatings trailer to the polar crane area and return. (Tr. p. 406). Furthermore, the parties stipulated that it was impossible to have gone to the polar crane area, taken the ambient temperature reading, then gone back to the trailer and then gone to the gate in five minutes. (Tr. p. 570 ). Thus, it was physically impossible for Miller to have taken the second reading at 23:55 as he reported and then siqn out at the gate five minutes later.

On Monday, March 9, 1987, Soileau was called into a meeting with Gunter, Emory and Richter and was asked to relate his concerns reqarding Miller's pre-application inspections of March 5 and 6, 1987. (Tr. p. 435-436). After Soileau related his observations, Richter asked Soileau to put his concern in writing. (Tr. pp. 360-361; 435-436; CX l5). On March 9, 1987, Soileau prepared a written quality concern regarding the pre-application inspections of Miller on March 5 and 6 and the concern that Miller had not taken a second ambient temperature reading at 11:55 p.m. on March 6 as stated on his inspection report. (Tr. p. 436; CX 27). Due to the concerns about Miller's pre-application inspections raised by Soileau, Gunter was instructed to monitor some of Miller's pre-application inspections to determine if they were being properly performed. (Tr. pp. 361-363, 641-642, 656). Gunter's monitorinq of Miller on March 14 and 15, 1987, proved inconclusive as to whether or not Miller was properly performing the pre-application inspections. (Tr. pp. 387, 642; CX 16, 18 and 20).

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Thereafter, Ebasco's Quality Control Site Supervisor, Ron Able, forwarded Soileau's quality concern to SAFETEAM for further investiqation. (Tr. pp. 642, 655). SAFETEAM is an independent organization which is responsible for conducting investigations of all concerns made by employees at the South Texas Nuclear Project regarding the construction of the project. (Tr. p. 290). Once a quality concern is raised by an employee, the quality concern is referred to SAFETEAM for investigation. (Tr. pp. 298, 643, 647).

SAFETEAM began its investigation of Soileau's quality concern by interviewing Soileau on the evening of March 30, 1987. (Tr. p. 436). Soileau discussed his concerns about Miller's pre-application inspections of March 5 and 6 and his concern that Miller may have falsified an inspection report. (Tr. p. 437). On the same evening, a SAFETEAM investigator met with Miller to discuss the concerns Soileau had raised and also discussed numerous errors Miller had made on some of his other inspection reports. (Tr. pp. 130-131, 220). Immediately following his interview with SAFETEAM, Miller found Soileau in

the restroom and asked Solleau if he had gone to SAFETEAM. (Tr. p. 438). When Soileau confirmed to Miller that he had qone to SAFETEAM, Miller told Soileau that "I better watch my back because he was out to get me." (Tr. p. 438).

Two days later, April 1, 1987, Soileau's supervisor, Emory, was stopped by another coatings inspector, Tom Turner, and asked why Soileau was checking after other inspectors. (CX 10). Emory was told that Soileau had been overheard asking a paint foreman about a floor that Miller had inspected. Emory reported the matter to another supervisor, Roy Byrd. (CX 10). Byrd and Emory called in Soileau and asked him if he was checkinq on other inspector's work. (Tr. p. 418). Soileau told Byrd and Emory that

he had asked a painter foreman, who had applied the coating, the thickness of the prime coat that was applied in order for him to permit the application of the top coat. (CX 8, 10; Tr. p. 418). On April 2, 1987, Miller, Turner and another inspector, D. Alston, went to Emory and Byrd complaining about Soileau askinq painters about Miller's work and watching Miller. (CX 9). On April 3, 1987, Byrd and Emory again met with Miller, Turner and Alston regarding Soileau checking on Miller's work. Byrd informed the group that the matter was being handled by SAFETEAM. Miller stated that he would give SAFETEAM one week to complete its investigation and then he would "take action on his

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own." (CX 7 and 11).

By memorandum dated April 13, 1987, SAFETEAM notified Houston Lighting & Power Company (HL&P) nuclear security that it was conducting an investiqation and had determined that "potential wrongdoing is indicated by personnel, relative to QC (Quality Control) inspections and QC documentation 'error' corrections in the second shift coatings area." (RX 18, Tr. pp. 479-480). The notification to HL&P nuclear security is in accord with site procedures as HL&P nuclear security investigates all matters involving potentia1 wrongdoing. (Tr. pp. 486-487). On April 28, 1987 SAFETEAM issued its report of its investigation of Soileau's quality concern. SAFETEAM concluded that Soileau's concerns were substantiated. (RX 20). On that date, SAFETEAM informed HL&P nuclear security of the results of its investigation and requested HL&P nuclear security to examine the report for potential wrongdoing. (RX 19).

On May 6, 1987, HL&P nuclear security investigator Carlos Ottino began his investigation of potential wrongdoing on the part of Miller in falsifying an ambient temperature reading on Inspection Report IC-70220. (CX 5; RX 29(3)). At the start of his interview with Miller, Ottino requested Miller to sign an HL&P Preliminary Interview Form which set forth the expectations of HL&P with respect to the investigation and setting out that any refusal or failure to cooperate in the investigation "may result in your access being denied from STP". (RX 29(14)). The form further provided that failure to cooperate included "your refusal or failure to take and respond truthfully to a polygraph

examination." (RX 29(14)). In the interview, with Ottino, Miller could not recall the particular inspection covered by Inspection Report IC-70220 nor could he remember when he had taken the second ambient temperature reading shown on that report, but stated that if he recorded 2355 as the time he took the second ambient temperature readings then that was when he did so. (RX 29(4); Tr. pp. 546-547). Ottino told Miller that it would have been impossible to have taken the ambient temperature reading at 2355 and to have signed out of the plant at 2400 and as such Miller would be asked to submit to a polygraph examination. (Tr. p. 178, 183 RX 1). Ottino also interviewed the painters that had performed the coatings work on the areas of the polar crane covered in Miller's Inspection Report IC-70220.

The three painters who performed the coatings work on the polar crane on the night of March 6, 1987, Daniel Munoz, Hector Suarez and Hernandez *4/* started applying the coatings to the areas of the polar crane at approximately 9:OO p.m. on the night of March 6 and completed their coatings work at approximately

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[ALJ PAGE 8]

midnight. All three painters testified that they did not see Miller come up to the polar crane on the night of March 6 at any time after 9:00 p.m. that night nor did they see Miller on the ladder leading up to the polar crane. (Tr. pp. 552-554; 559-560).

Miller was absent from work on Monday, May 11, 1987 and did not call in to report his absence until 11:50 p.m. Miller was also absent on Tuesday and Wednesdav, May 12 and 13, 1987, and did not call in until after 9:00 a.m. to report his absence. Miller was scheduled to report for work at 6:00 a.m. (Tr. p. 609). Due to Miller's failure to call in and his having been absent on six Mondays in 1987, Miller's supervisor, Stevens, prepared a written warning to be issued to Miller. (Tr. p. 584; RX 3). Stevens discussed the warning with Miller on the morning of May 19, 1987. Miller had been scheduled to work until midnight on March 10, 1987 and should not have been scheduled to report for work at 6:00 a.m. the following morning. Stevens acknowledged the mistake and understood his being late to work that morning. (Tr. p. 610; RX 30). However, Miller had been absent too frequently on Mondays, and had failed to call in to report his absence until more than three hours after his starting time on three consecutive days and the warning would be issued for those reasons. (Tr. p. 610; RX 30). Miller prepared a response to the warning which was attached to the warning and forwarded to Personnel. (RX 3l).

On May 19, l987, Ebasco received notification from HL&P that Miller was scheduled to submit to a polygraph examination at 4:45 a.m. on May 21, 1987 in furtherance of the investigation being conducted by the HL&P Nuclear Security Department. (RX 6; Tr. pp. 187-l88). On May 18, l987, Miller's attorney wrote to Ottino and Able regarding the Polygraph Miller was scheduled to take and the reasons for the polygraph. (RX 22a). On May 20, 1987, HL&P notified Ebasco that the polygraph previously scheduled for Miller had been postponed due to the letter from Miller's

attorney. (RX 7; Tr. p. 184, 496-497).

*4/* The parties stipulated that Hernandez would testify substantially the same as Suarez. (Tr. p. 562). Munoz, Suarez and Hernandez were the three painters identified on Miller's Inspection Report IC-70220 as being the painters who were to apply the coatings to the areas covered by the inspection report. (CX 5).

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[ALJ PAGE 9]

Just prior to or immediately after Miller was informed of the date and time for his polygraph examination, Miller visited the NRC offices at the South Texas Nuclear Project. (Tr. pp. 145, 708-709; CX 36, p. 11). The NRC Inspection Summary reflects that its inspection covered the period from May 11 through July 3, 1987. (CX 38). The issues raised by Miller with the NRC related to the sandblasting of valves which had occurred while Miller was assigned to the fabrication yard in 1985. (CX 38, pp. 10-12). The NRC conducted an investigation regarding the valves and found no problems regarding the valves. (CX 38, p. 11).

By letter dated June 5, 1987, the HL&P Nuclear Security Department informed Ebasco that Miller was scheduled for a polygraph examination to be conducted on June 11, 1987 at 10:00 a.m. (RX 8). Miller appeared at the office of the polygraph examiner, but told the examiner that he was not voluntarily submitting to the polygraph examination, but was doing so only because he would otherwise lose his job. (Tr. p. 195, 500-501; RX 29(17)). On June 15, 1987, Ebasco was informed by HL&P that "Miller's site access is denied due to his failure to fully cooperate while under investigation by the Nuclear Security Department for a potential wrongdoing." (RX 9; Tr. p. 307, 502). Miller was informed by Ebasco Site Personnel Manager, Bill Urell in the presence of Ottino that Miller's site access would be denied by HL&P unless he agreed to submit to a polygraph examination. (Tr. pp. 307-308).

Miller's attorney wrote HL&P and Ebasco on June 16, 1987 advising that Miller would agree to submit to a polygraph examination conducted by a polygraph examiner acceptable to Miller's attorney (RX 23). Based upon the assurances of Miller's attorney, HL&P informed Ebasco by letter dated June 18, 1987, that Miller's site access was being restored subject to Miller fully cooperating in the investigation being conducted by the HL&P Nuclear Security Department, not performing any safety related work until the investigation was completed and successfully completing a polygraph examination. (Tr. p. 308; RX 10). Miller was again scheduled for a polygraph examination for June 23, 1986. However, Miller became ill and the polygraph examination was canceled. (RX 25). Another polygraph examination was scheduled for Miller for June 29, 1987, but was canceled due to the illness of the examiner. (Tr. p. 195; RX 11, 25, 29).

Miller's attorney and an attorney for HL&P agreed upon another polygraph examiner to conduct the polygraph examination of Miller and Miller was again scheduled for a polygraph examination for July 8, 1987. (Tr. pp. 507-508; RX 28, 12). Ebasco was not

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involved in the decision to require Miller to submit to a polygraph examination, nor in the scheduling of any of the polygraph examinations. 5/ (Tr. pp. 303-312, 490, 492).

5/ The dates, times and locations of the scheduled appointments for the polygraph examination were transmitted to Miller from HL&P using Ebasco personnel as a conduit for those communications. (RX 6 through RX 12).

Miller filed a Complaint with the Department of Labor alleging that he was being subjected to harassment sometime after his visits to the NRC in 1987. (Tr. pp. l70, 710, 711). The Complaint filed by Miller is dated June 3, 1987 and date stamped as received June 8, 1987 by the U.S. Department of Labor, Houston, Texas. (See Pleadings file).

Miller reported for the scheduled July 8, 1987 polygraph examination and was finally administered the polygraph. Upon the conclusion of the polygraph, Ottino was informed that Miller had not passed the polygraph examination. (Tr. pp. 513-5l4). The polygraph examination of Miller culminated the investigation which Ottino had been conducting regarding Miller's falsification of the ambient temperature reading on Inspection Report IC-70220. Ottino concluded that Miller did not record the ambient temperature reading in accordance with established site procedures and that Miller did not physically locate himself in the vicinity of the polar crane at the time the second ambient temperature reading was recorded, and for those reasons Miller's access to the South Texas Nuclear Project was denied. (RX 29(7); Tr. pp. 514, 517-520, 539, 544-545). On July 9, 1987, Ebasco received a letter from HL&P advising that "effective this date, the investigation concerning D. Miller's involvement in a potential wrongdoing matter has been completed. Accordingly, his site access to the South Texas Project is denied." (RX 13; Tr. p. 312). Ebasco had no input into the decision to deny site access to Miller. (Tr. p. 514). On that date, Miller was told to clean out his desk and report to Urell's office. Urell informed Miller that he had been denied access to the South Texas Nuclear Project by HL&P and that, accordingly, he was being terminated from the South Texas Project by Ebasco. (Tr. p. 3l2; RX 14). At that time, Miller's name as well as the names of two other individuals were provided to other sites where Ebasco was then employing quality control personnel, none of the three were picked up by another site and all were laid off by Ebasco as a reduction in force. (Tr. pp. 671-673; RX 34). At the time Miller was terminated from the South Texas Nuclear Project, Ebasco had not been apprised of the basis for the results of the SAFETEAM and HL&P Nuclear Security Department investigations. (Tr. p.

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676). However, in preparinq for the hearing in the instant case, Ebasco discovered the information developed in those investigations, has come to the same conclusion and Miller would not now be eligiible for rehire by Ebasco. (Tr. p. 676).

*DISCUSSION*

As was discussed above in the Findings of Fact, the sequence of events culminating in the termination of Miller by Ebasco unfolded in a period of time covering over three years. While all of these events are relevant to the disposition of this matter and to the burdens of proof that must be borne by the parties, all of these events are not actionable under the Energy

Reorganization Act of 1974, 42 U.S.C. § 5851. 42 U.S.C. § 5851(b)(1) and 29 C.F.R. §24.3(b) allow a complainant to file his complaint within 30 days of the occurrence of an alleged violation. Miller filed his original complaint on June 8, 1987. Miller also filed a First Amended Complaint on July 15, 1987 and a Second Amended Complaint on August 17, 1987. Therefore, no action taken by Ebasco prior to May 9, 1987 is actionable as no complaint was timely filed. Therefore, the transfer of claimant to the fabrication yard in 1985 is not an actionable adverse employment action under this complaint. The surveilance of Miller and the related file initiated by Ebasco in early March of 1987 is likewise not actionable. Finally, the referral of this matter by Ebasco to SAFETEAM in late March of 1987 is also not an actionable act of discrimination under this complaint. Miller's termination by Ebasco on July 9, 1987, however, is the sole adverse employment action made actionable by the filing of this complaint.*6/* As previously stated, all events relevant to the relationship between Miller and Ebasco will be considered as evidence of a possible pattern of discrimination irrespective of the time of their occurrence, but only those events subsequent to May 3, 1987 are actionable with respect to this complaint.

The Secretary of Labor has outlined the burdens of proof that must be met by the parties in discrimination actions brought under the Energy Reorganization Act of 1974, 42 U.S.C.§5851 (ERA) and its associated regulations, 29 C.F.R. § 624. *Dartey v. Zack Co.*, 82-ERA-2. (April 25, 1983). The Secretary's analysis of the relevant cases and the shifting burdens of proof is particularly clear and concise and is as follows:

> I think it would be useful to set forth the general principles which I will apply to retaliatory adverse action cases arising under

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[ALJ PAGE 12]

> 29 C.F.R. Part 24 and the statutes enumerated there, because similar questions arise in almost all these cases. There are two leading Supreme Court cases which, taken together, establish the overall framework for analyzing the evidence in a retaliatory adverse action case and evaluating whether the parties have met their respective burdens of production or going forward with the evidence, and burdens of proof or persuasion. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) dealt with the initial stages of proof in an intentional discrimination case under Title VII of the Civil Rights Act of 1964 which

*6/* The issuance of the warning letter to Miller on Mav 18, 1987 (RX 3) meets the thirty day time requirement; however, for the reasons discussed hereinafter, such event is not considered an adverse action related to the gravamen of this action.

I think is equally applicable to cases arising under 29 C.F.R. Part 24. In *Burdine*, the Supreme Court made clear that the plaintiff always bears the burden of proof or persuasion that intentional discrimination has occurred. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a retaliatory adverse action case under the Constitution which is closely analogous to 29 C.F.R. Part 24 cases, the Supreme Court set forth the nature of the burden of proof or persuasion which falls upon the defendant once the plaintiff has carried his burden of proof. *Mt. Healthy* has been applied explicitly by at least one Circuit Court of Appeals to section 5851 of the Energy Reorganization Act. *Consolidated Edison Company of New York v. Donovan*, 673 F.2d 61 (2nd Cir. 1982); *Jaenisch v. U.S. Department of Labor and Chicago Bridge and Iron Company*, F.2d (No. 81-4149, 2nd Cir. June 28, 1982.) Cf. *Deford v. Secretary of Labor*, F.2d , (Nos. 81-3228 etc., 6th Cir., February 10, 1983). 7/

Under *Burdine*, the employee must initially present a *prima facie* case consisting of a

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[ALJ PAGE 13]

showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his *prima facie* case, "the plaintiff must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action." *Cohen v. Fred Mayer, Inc.*, 686 F.2d 793 (9th Cir. 1982) (applying *Burdine* to a retaliatory discharge claim under Section 704 (a) of Title VII). If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of discrimination rests with the employee. *Burdine supra*, 450 U.S. 248, 254-255. If the

7/ *Deford v. Secretary of Labor*, 700 F.2d 281 (6th

Cir. 1983).

> employer successfully rebuts the employee's prima facie case, the employee still has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision . . . . [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id*. at 256 (citation omitted.) The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. *Id*. at 254-265. Finally, the trier of fact may

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[ALJ PAGE 14]

> decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual motives."
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> Under *Mt. Healthy*, if the trier of fact reaches the latter conclusion, that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, *supra*, 429 U.S. 274, 287; *Consolidated Edison Company of New York v. Donovan*, *supra* 673 F.2d 61, 63 . (footnote added).

*Dartey* at pp. 6-9

The complainant in this case has presented a *prima facie* case. There is no serious dispute that in 1985 claimant went to the Nuclear Regulatory Commission (NRC) with concerns about the integrity of coatings being applied at the South Texas Nuclear Project. There also is no dispute that the employer, Ebasco, knew that complainant had gone to the NRC. Also, it is an established fact that complainant was discharged by Ebasco. (CX 6). The controversy revolves around whether complainant has produced evidence that raises the inference that he was discharged because of his contacts with the NRC.

Mr. Miller introduced evidence showing that he had been in

the coatings quality inspections group prior to his initial contact with the NRC in 1985. (Tr. p. 22). Sometime around the time of this contact, Miller was transferred from coatings to mechanical inspections. (Tr. pp. 71-73). This transfer was a lateral move and did not involve any reduction in salary. (Tr. p. 203). Mr. Miller was reassigned to coating inspection on February 23, 1987. (Tr. p. 90-91). Between March 6 and March 15, 1987 Ebasco personnel surreptitiously surveilled complainant's inspections to determine if complainant was performing his inspection duties properly. This surveillance was immediately followed by the referral of a "concern" initiated by a fellow inspector, Soileau, on March 9, 1987 that complainant had not performed his inspections properly to SAFETEAM, an independent investigatory body. Sometime around early May, 1987,

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[ALJ PAGE 15]
complainant went to the NRC to complain about the harrassment he was receiving from his employer. In a subsequent meeting with Johnson of the NRC staff, complainant reported on safety related conditions at the work site. Thereafter, on May 18, 1987, complainant was issued a warning letter by Ebasco for ~an abuse of....benefits" (exceeding the alotted sick leave and failing to call in sick in a timely manner). Following these events, complainant was terminated by Ebasco on July 9, 1987.

Taking the evidence offered by claimant exclusively such evidence is determined to be sufficient to raise an inference that the protected activities, namely, reporting safety concerns to the NRC staff in 1985 and again in May, 1987 were the likely reason for claimant's termination in July, 1987. Accordingly, it is found that claimant has established a *prima facie* case of discrimination under the statute.

In rebuttal of the complainant's *prima facie* showing, the respondent asserts that Mr. Miller was released from its employ
solely because he was denied access to the plant site by the Houston Lighting & Power Company (HL&P) Nuclear Security Department. Ebasco has established that HL&P did deny complainant access to the plant site. (RX 9; RX 29). Ebasco has also established that without access to the site complainant was not able to perform his employment duties. (Tr. pp. 312-314). Further, Ebasco has shown that it was unable to transfer complainant to a job at another facility. (Tr. pp. 672-673; RX 34). The undersigned finds that this evidence establishes that the termination of Miller was motivated by legitimate, nondiscriminatory reasons.

Having found that respondent has put forth a legitimate reason for terminating the complainant, the burden of persuasion now shifts back to the complainant to show that respondent's asserted reason was only a pretext for discriminatory conduct.

Complainant's basic theory, as argued in his briefs, is that complainant was subjected to a series of adverse employment actions as a result of his engaging in protected activities which

adverse actions culminated in his termination in July of 1987. The first consideration in analyzing the events that took place concerns the issue of whether Ebasco's transfer of complainant in 1985 constituted an adverse employment action.

The record shows that sometime near the late summer of 1985 complainant was transferred from the coatings inspection group to

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[ALJ PAGE 16]
the mechanical inspection group. Complainant had no experience or expertise in the mechanical inspection group and, according to him, spent all of his time from the time of the transfer until sometime in early 1986 doing nothing except studying the mechanical specifications in order to become certified as a mechanical inspector. Since complainant had complained to the NRC near the time of this transfer, complainant argues that such transfer was in retaliation to him having made safety related complaints to the NRC.

This argument is rejected. The record shows that for several months after the transfer, complainant's only duties were to familarize himself with the specifications in the mechanical section in an effort to become certified as a mechanical inspector. After becoming certified, in early 1985, he proceeded to perform the duties of a mechanical inspector without incident for the next year until he was transferred back to the coatings inspection group. During the time he was assigned to the mechanical inspection group, he was paid the same wages as he earned as a coatings inspector and the result was he became qualified to perform two different functions which ordinarily could be expected to enhance his job security. The best evidence of how this transfer affected complainant was complainant's acceptance of the transfer without complaint. The record shows that while complainant was obviously aware of his rights which protected him against retaliatory action by his employer, complainant made no complaint about the transfer and continued working in his new capacity as a mechanical inspector trainee and later a mechanical inspector for approximately a year and a half after the transfer. This inaction by complainant leads this fact finder to conclude that the transfer was not an adverse action. In any event the evidence is found to be insufficient to establish that the transfer constituted an adverse employment action.

The next consideration involves the warning letter of May 19, 1987 which Ebasco issued to complainant for allegedly abusing his benefits. (RX 3). The evidence establishes that the issuance of a warning letter to an employee was a disciplinary action and

could result in the employee's termination.*8/* The significance of this warning letter is that it is the only specific action that occurred after complainant went to the NRC in 1987 which occurred within thirty days prior to the filing of complainant's complaint of discrimination under the Energy Reorganization Act, 42 U.S.C. § 5851.

The stated reasons for issuing the warning letter were that complainant had "taken off seven Mondays in 1987, having exceeded the allowed sick time for the entire year (72 hours taken)... " The other stated reason was "having failed to call in sick in a timely manner". (RX 3). There is virtually no evidence in this record concerning the number of claimed absences from work on Mondays other than claimant's response to the warning letter dated May 19, 1987. (RX 5). There, complainant offers an explanation for two of the absent days. (May 12 and May 13, 1987). There was, however, substantial proof offered which supports the conclusion that complainant's failing to call in sick in a more timely manner did not violate any policy or work rule applicable to complainant. Thus, concerning the substance of the warning letter, it appears that two reasons were given one of which was invalid. Nevertheless, there has been no showing that the issuance of a warning letter for what shall here be described as excessive absences from work was anything other than a legitimate disciplinary action by complainant's employer. Indeed, complainant does not argue in his brief that the issuance of this warning letter constituted an adversed employment action made in retaliation to complainant's engaging in protected activity. Moreover, the evidence shows that the issuance of this warning letter played no part in complainant's termination. For these reasons the issuance of the warning letter is not found to constitute a retaliatory act in violation of the statute.

A final consideration before addressing the merits of complainant's contention involves the two theories of discriminatory action advanced by complainant in his brief. Other than complainant's actual termination in July, 1987, the remaining discriminatory actions presented by complainant all occurred after complainant was transferred back to the coatings inspection group on February 23, 1987 but before he made safety-related complaints to the NRC in May of 1987. The principle actions which could constitute a pattern of discrimination consisted of the gathering of a so-called secret file against complainant and the covert surveillance of complainant performed by Ebasco Personnel. The record shows that the files accumulated and the surveillance of complainant which

*8/* Three warning letters were required to be issued before termination. The record shows that this was the first warning letter received by complainant and no further warning letters were issued to him.

was conducted by Ebasco Personnel began no earlier than March 2, 1987 and ended around mid March of 1987 - approximately ten weeks before complainant made any safety complaints to the NRC Staff in 1987. The act of referring the "concern" that claimant had falsified an inspection report to SAFETEAM for investigation clearly occurred before claimant went to the NRC in May of 1987 and the other specific act claimed by complainant to be discriminatory relates to the claim that Ebasco instructed its employees to lie and exagerate to the SAFETEAM and Nuclear Security Investigators about complainant in such organizations' investigations of complainant which commenced in late March of 1987.

Since most if not all of these claimed discriminatory actions took place before complainant complained of safety violations to the NRC staff, which complaint most likely took place in early May of 1987, complainant advances two theories of how such actions constitutes adverse employment actions violative of the Energy Reorganization Act. The first theory is that these actions were in retaliation of complainant having made safety complaints to the NRC Staff in 1985. As tenuous as this theory is factually due to the lapse of time between the asserted protected activity and the claimed retaliatory action, this theory of violation is viable. The other theory is not. Complainant asserts as an alternative theory of violation that the aforesaid retalitory actions were taken by Ebasco in anticipation that complainant would "be back to the NRC with similar complaints as those lodged in 1985". (Complainant's brief at 7; See also Complainant's brief at 5). Thus, complainant claims that the employer's actions constituted "anticipatory retaliation" which constitutes prohibited activity under the "about to commence" clause of the Energy Reorganization Act. (42 U.S.C. § 5851(a)(1))

The evidence of record simply does not support this alternative theory of violation and it is therefore rejected. The record is devoid of any evidence suggesting that complainant would make any further complaints of safety violations until April 3, 1987 when Miller announced "he would give SAFETEAM one week to do their investigation then he would take action on his own." (CX 11).*9/* Prior to that announcement by complainant, there is nothing in this record that would suggest that complainant, by deed or word, was going to make any further complaints to the NRC about safety conditions at the work site.

*9/* This statement by complainant can be construed as a threat by complainant that if the SAFETEAM investigation against him was not closed within a week, he would go back to the NRC with more complaints.

Turning now to the thrust of complainant's case, it is his contention that Ebasco was out to get him from the outset of his being transferred back to the coatings inspection group in late

February, 1987. Thus, according to the conspiratorial theory advanced by complainant, Ebasco soon afterward instituted a covert surveillance program to monitor claimant's activities, maintained a secret file on him, turned the matter over to SAFETEAM for investigation and waged a secret campaign of lies about him after the charges of his possible misconduct had been turned over to SAFETEAM for investiaation. Further, these Ebasco activities ultimately led to complainant being denied site access by HL&P and then terminated by Ebasco.

In examining what is presented as the four manifestations of this pattern of discriminatory conduct by Ebasco, it is concluded that they are not the result of a effort to retaliate against complainant and do not support complainant's conspiratorial theory. To the contrary, both the surveillance of complainant by Ebasco personnel and the maintenance of files which basically relate to such surveillance activity appear to be both reasonable and proper under the circumstances. Furthermore, the claim of disparate treatment is unsupported by the facts as is the claim that Ebasco instructed its employees to lie and exaggerate about Miller's inspection activities to the SAFETEAM investigators.

The so-called covert surveillance of Miller's inspection activities was a result of observations reported to Ebasco supervisory personnel by another coatings inspector, Duane Soileau, who reported that he had observed Miller not performing his inspection duties properly. The record shows that Soileau's observations of Miller's activities was done on Soileau's own initiative and without the instigation of Ebasco personnel and that Soileau's motivation for observing Miller's inspection activities was a genuine concern that a fellow employee was not perfoming his job properly and thereby jeopardizing the integrity of the inspection process critical to safety of the plant. The record further shows that the surveillance that was instigated by Ebasco as a result of Soileau's report was done in an effort to determine if there was any substance to this report and that it was only after this surveillance proved to be inconclusive that the matter was referred to SAFETEAM for investigation. Under these circumstances it is found that the surveillance of Miller was both reasonable and proper.

The so-called secret file consist of documents received as CX 14 through 20. All of these are handwritten memoranda written by complainant's lead inspector, Al Gunter to Gunter's supervisor, Dave Emory. With one exception, the memorandum comprising this file consist of Gunter's documentation of his surveillance of Miller's inspection activities together with a background memorandum prepared by Gunter on March 9, 1987 or thereafter. (CX 15; CX 16). The one exception to this is the

memorandum dated March 4, 1987 from Al Gunter to Dave Emory received as CX 14. This memorandum briefly summarizes a discussion Gunter had with Miller on March 2, 1987 the subject matter of which is described by Gunter in the memorandum as a ways to cut down on paperwork. In actuality, the discussion which was testified to by both Gunter and Miller related to a proposal by Miller to eliminate the necessity for the taking of ambient temperature readings. It is critical to the substantive issues in this case in that it documents Miller's disinclination to take ambient temperature readings. However, as to the issue presented here, namely, whether the maintenance of such documentation by Ebasco is a manifestation of a pattern of conduct by Ebasco Personnel to retaliate against Miller, no such inference is drawn. Indeed, given the fact that Ebasco did undertake an in-house surveillance of Miller's activities prior to referring the matter to SAFETEAM for investigation, it would be surprising if the documentation evidenced by CX 15 through 20 was not generated and maintained. As to the earlier memorandum dated March 4, 1987 (CX 14), its author, Al Gunter testified that he prepared it and sent it to his supervisor for informational purposes simply because Gunter thought it sufficiently important to aprise his supervisor of what had transpired between himself and Miller during their discussion. (Tr. pp. 574-576). Mr. Gunter's explanation as to the creation of this memorandum is accepted and the creation and the maintenance of these memoranda (CX 14-20) are rejected as evidence that Ebasco commenced actions immediately after Miller was transferred back into coatings in retaliation for Miller having gone to the NRC.

Complainant's claim of disparate treatment which is claimed to be in furtherance of this pattern of discrimination against claimant refers to the referral of the allegation of Miller having falsified an inspection report to SAFETEAM for investigation. The substance of complainant's contention here is that the investigation of his activities should not have been referred to SAFETEAM, but should have been pursued by the issuance of a Noncomformance Report (NCR). Complainant contends that investigations of other inspectors facing similar charges were not referred to SAFETEAM for investigation; hence, the referral of charges against him to SAFETEAM for investigation constitutes evidence of disparate treatment.

This contention is also rejected. Complainant proffers the treatment received by two other inspectors, Tom Glidden and Otis Ross to show that similar charges were made against them and that the handling of these other charges did not result in referring the matters to SAFETEAM for investigatfon. While this is true, the facts and circumstances of these two other instances are clearly distinguishable from these presented here. The Glidden

investigation occurred in 1984, it preceeded the creation of SAFETEAM. In the Glidden incident, an in-house investigation was conducted by Ebasco to determine if allegations made that Glidden had falsified inspections could be corroborated. This in-house investigation by Ebasco could not corroborate the allegations (CX 23) and the matter was concluded without further action. Insofar as this record shows, there was no other investigative arm

available to handle such incidents until January of 1986 when SAFETEAM was created.

The 0tis Ross incident arose out of inspection reports prepared by Ross which reported that he had conducted inspections at two different places at the same time. At the time this discrepancy was discovered Ross was no longer employed by Ebasco; thus, the matter was handled by issuing a Nonconformance Report which denotes a deviation from a specification and requests a disposition by a Bectel Engineer (the prime contractor) to remedy the deviation. In addressing this apparent deviation, Bectel determined that there was no deviation rationalizing that the inspector had merely rounded off the times of the inspections.*10/*
Despite the dubious disposition of the Ross matter, it does not demonstrate a difference in treatment which would support complainant's contention that he received desparant treatment from his employer. The charges against Miller were referred to SAFETEAM because they constituted possible evidence of wrongdoing by Miller, a current employee, that required investigation to determine whether the descrepancies in his inspection report were a result of wrongdoing or unintentional error. While the Ross incident may also represent a situation where another inspector had engaged in wrongdoing, that inspector was no longer employed at the works site and was no longer employed by Ebasco. Under these circumstances, this difference in treatment was amply justified.

The final matter presented as evidencing a pattern of discrimation against complainant is the allegation that Ebasco instructed its employees to lie and exaggerate to the investigators after the allegations against complainant was turned over to SAFETEAM. Having thoroughly considered this issue, it is determined that there is simply no merit in this contention. There is no evidence of any such instructions eminating from Ebasco or its personnel and any differences between the statements made by Ebasco employees to the investigators from the testimony those employees gave at the hearing can be explained on the basis of inexactness of expression rather than any attempts to mislead the investigators as to Miller's activities.

*10/* The proof in this record establishes that coatings inspectors were instructed and trained to record the precise time of their inspections and that they were not instructed to round off such times.

Having considered and rejected each of the principle matters presented by complainant as supporting his contention that he was subjected to a pattern of adverse employment actions against him as a result of his having complained of safety violations to the NRC, it follows that complainant's claim of discrimination must fail. The evidence shows that Ebasco terminated complainant for the precise reason which they gave, namely because HL&P as a result of investigations conducted by them and its agents denied

complainant access to the site. In reaching this conclusion, it is not appropriate or necessary for this fact finder to determine whether or not Miller falsified an inspection report as HL&P concluded as a result of its investigation. The salient point to be made here is that complainant's employer, Ebasco, acted properly and the evidence falls far short of establishing an act or acts of discrimination against claimant which are attributable to claimant having made safety complaints to the NRC.

In reaching the forgoing ultimate conclusion which is dispositive of this case, two additional issues will be addressed. The first of these concerns the polygraph examinations which the record shows complainant was coerced into undergoing by HL&P, the results of which undoubtably was a factor in that HL&P's determination to deny complainant site access. Whether using the results of those polygraph test was legal or illegal is an issue beyond the scope of this determination. It is clear from this record that the use of the results of the polygraph examinations was action attributable to HL&P and not Ebasco. The record further shows that Ebasco's role with respect to the polygraph examinations were simply to communicate to its employee, Miller, the times and places when HL&P had scheduled Miller to undergo these polygraph examinations. The final point to be made with respect to the polygraph examinations is that since the undersigned makes no determinations here as to whether or not Miller did in fact falsify the March 6, 1987 inspection report, the results of the polygraph examinations were not considered in determining the issues presented here including credibility issues.

The final issue to be addressed concerns the conflict in evidence. Both Gunter and Soileau testified that on different occassions each invited Miller to accompany them on an inspection in the area of the polar crane and that Miller declined each invitation. (Tr. pp. 359, 410, 443-446). Both Miller and Gunter testified that these invitations were extended to Miller shortly after he was transferred back to the coatings inspection group

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which occurred on February 23, 1987. Complainant on the other hand emphatically denies any such invitations. (Tr. pp. 204-205).

In resolving this conflict in the testimony, the undersigned finds that Miller was invited to accompany by both Soileau and Gunter. This finding is based upon the undersigned's determination of the credibility of the witnesses and the weight of the evidence on this issue. The undersigned was particularly impressed with the sincerity of Soileau as revealed by his demeanor at the formal hearings. The undersigned was also impressed by the objectivity of Gunter. His testimony as well as his actions, as revealed by this record, demonstrate a lack of animus on his part towards complainant. While the testimony of Gunter and Soileau do not directly corroborate either invitation, their combined testimony supports the conclusion that Miller was offered an opportunity to accompany another inspector and that Miller declined the invitation. In light of this direct

conflict, the undersigned must balance the consistent testimony of two credible witnesses against the testimony of the complainant to arrive at a factual finding. As such, the undersigned accepts the testimony of Gunter and Soileau and that it is found that each extended, independently, an invitation to complainant which complainant declined and the conflicting version of these events denying that such invitations had been extended is rejected.

In view of the foregoing it is found that the evidence is insufficient to establish that Ebasco Services, Inc. discriminated against complainant, Daniel N. Miller, for engaging in activity protected by Section 210 of the Act by terminating him from his employment at the South Texas Nuclear Project on July 9, 1987. It is, therefore, recommended that the following order be issued:

RECOMMENDED ORDER

Complainant's claim for relief is hereby DISMISSED.

Quentin P. McColgin
Administrative Law Judge

Metairie, Louisiana
E/26